

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL PORK PRODUCERS
COUNCIL, WISCONSIN PORK
ASSOCIATION, and DAIRY BUSINESS
ASSOCIATION OF WISCONSIN,

Plaintiffs,

v.

LISA P. JACKSON, Administrator,
United States Environmental Protection
Agency,

Defendant.

ORDER

09-cv-73-slc

Defendant Lisa Jackson has moved to dismiss or transfer this case on the ground that plaintiffs should have filed it in the Court of Appeals for the District of Columbia Circuit. Dkt. #13. In her reply brief, defendant raises an argument for the first time that Count I of plaintiffs' complaint is not justiciable in *any* court for various reasons. Dkt. #34, at 7-14. As I noted in my order denying plaintiffs' request to file a sur-reply brief, a reply brief is not the place to be raising new arguments. However, because jurisdictional arguments cannot be waived, *Luna v. United States*, 454 F.3d 631, 635 (7th Cir. 2006), I will set up a short briefing schedule to allow the parties to address the new jurisdictional issues. Defendant may have until April 20, 2009 to file an opening brief; plaintiffs may have until April 30 to file a response; and defendant may have until May 5 to file a reply. A decision on

defendant's motion to dismiss is stayed until the jurisdictional issues are resolved. However, the parties should *not* use this as an opportunity to supplement their other arguments in favor of dismissal or against it; the sole question for the new motion is whether Count I of plaintiffs' complaint is justiciable.

Entered this 14th day of April, 2009.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge